90-1854

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EDWIN L. CRUMLING,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When the Postal Service engages in conduct consisting of a fourteen month sting operation designed to induce a citizen to purchase illegal child pornography, and this conduct eventually has the desired result—the citizen places an order, receives the material, is arrested and convicted—can the District Court consider the fact of the sting operation, its duration, and conduct as departure factors warranting a downward departure from the sentence otherwise prescribed by the Federal Sentencing Guidelines?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

To the knowledge of the petitioner, the decisions of the courts below have not been reported. They are attached to this Petition as Appendices.

STATEMENT OF JURISDICTION

The Petitioner seeks this court's review of the judgment order of the United States Court of Appeals for the Third Circuit entered on February 5, 1991. The Order of the U.S. Court of Appeals for the Third Circuit denying the Petitioner's timely Petition for Rehearing in that

Court was entered on March 12, 1991. No order has been entered extending the time in which to file the petition for writ of certiorari. The jurisdiction of this court is invoked pursuant to 28 USC § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 USC section 2252, 18 USC section 3353, and Sentencing Guideline section 5K0.0 are attached as appendices to this petition.

STATEMENT OF THE CASE

Federal jurisdiction exists by virtue of this Petitioner's conviction for a violation of 18 USC § 2252.

Edwin L. Crumling is a 49 year old resident of Lewistown, Pennsylvania. He was born on November 28, 1941 and was raised on a farm in Reedsville, Pennsylvania. In 1960 he graduated from Kishacoquillas High School and in 1963 received his Bachelor of Arts degree from the Pennsylvania State University (Record 123)[1]. From 1964 to 1989 Crumling was employed by the Mifflin County Public Assistance office as a caseworker, and has been honored by this agency for "twenty-five years of faithful service." (Record 123) Crumling has served on several community committees involved in employment and training opportunities. (Record 123) He is known to his co-workers and friends as a generous person who would often go far beyond the requirements of his job in serving the needy members of his community. (Record 148-161). Until his arrest in this case, he had never once been in trouble with the law (Record 121).

In April 1985 Mr. Crumling's father passed away (Record 122). Since that time Ed, who also has one brother and one sister both living in other states, has

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[1] References to "Record" and then to a number refer to the page where the cited material appears in the Appendix which was filed with the appeal to the Circuit Court.

been primarily responsible for the care of their elderly mother. Mr. Crumling's mother, who is 86 years of age and in poor health (Record 44), resides with her son on the family farm in Reedsville (Record 122). She is unaware of his current legal troubles. (Record 122)

Ed Crumling's troubles began when in June 1987 a state search warrant was executed on the HSB/A&B Video establishment in Orlando, Florida. Mr. Crumling's name was found on A&B's mailing list along with a copy of a letter he had sent to A&B (Record 118). It was at this point that the Petitioner became the target of a Postal Inspection Service "sting" operation. (Record 118).

Crumling's name and address were turned over to Inspector Debra Harris of the San Francisco, California office. (Record 14). On or about August 5, 1987 she sent Mr. Crumling a letter, pretending to be from the "Computer Link Co-op": a club which purportedly sought to protect the individual's First Amendment right to read the sexual materials of his choice. The letter invited Crumling to "join the club". (Record 16) (Government Exhibit 2). On August 8, 1987, Crumling mailed back his response to this invitation. (Record 9) This response has never been charged as a violation of any state or federal law.

In July 1988 Harris targeted Crumling for a second false invitation: this one pretended to be from "Vintage Image, Ltd." and was part of another undercover program established by the Harrisburg Division of the Postal Inspection Service. (Record 119). This invitation claimed to be from the head of a overseas video company. It described the various services offered by the company which included the sending of child pornography through the mails. The letter asked Crumling to complete and return a coupon for more information (Record 16). Discreet and confidential service was promised. (Government Exhibit 4). On July 22, 1988 Mr. Crumling responded to

the letter requesting that more information be sent to him. (Record 10) (Government Exhibit 4).

Inspector Harris received the letter which Crumling sent to "Vintage Image Ltd." and on August 5, 1988 sent Crumling yet another mailing. (Record 18) (Government Exhibit 5). This one offered to sell him magazines which depicted sexual activity by minors. (Record 18) Also included was a copy of the locator service which was designed to give the individual an opportunity to describe exactly the kind of material he was interested in. (Record 18). In September 1988 Inspector Harris finally received the order which she had sought for fourteen months (Record 18). Harris next sent Crumling another letter, this one stating that 2 out of 3 magazines he ordered were available. (Record 20).

On November 18, 1988 a controlled delivery of the magazines took place. Pursuant to an order which the postal inspectors had obtained from a United States Magistrate, a beeper had been placed in the package along with the magazines. (Record 20). The package was hand delivered by postal inspectors to the post office in Lewistown, Pennsylvania. A call slip was filled out and placed in Crumling's post office box. (Record 26) Postal inspectors stationed themselves at various surveillance points both outside and inside the post office to await the manufactured downfall of this middle aged civil servant (Record 21). At about 10:00 a.m., Crumling played into their hands and picked up the government's package. (Record 21) Two Postal Inspectors then tailed Ed Crumling as he went about his daily business. They followed him to his place of employment and watched as he entered the building. When Mr. Crumling left the building at lunchtime they followed him as he performed various errands and then returned to work again. (Record 21). The inspectors finally entered Crumling's place of employment, the Mifflin County Public Assistance Office, at 2:00 p.m. (Record 21). The package which Inspector

Harris had sent Ed Crumling was still in Ed's car—unopened. (Record 28)

When the inspectors entered Ed's office, they first visited one of his co-workers and eventually were brought to Mr. Crumling. (Record 48-49) They questioned him about the package. The shock of the encounter made Crumling faint and ill (Record 56), but he still agreed to talk (Record 49). He later consented to a search of his vehicle and of the home which he shared with his mother. (Record 15). The search of his home revealed the envelopes and correspondence from CLC, Vintage Image, and A&B Video. (Record 119). The inspectors found no criminal materials in either Ed's house or car, except for the package which they themselves had sent him (Record 119).

Ed was indicted on August 22, 1989, on one count of receiving by mail visual depictions of minors engaged in sexually explicit conduct in violation of 18 U.S.C. § 2252 (c) (2). (Record 118). On October 18, 1989 he pleaded not guilty and was tried non-jury on December 13, 1989 by the Honorable Sylvia H. Rambo. Judge Rambo found Ed Crumling guilty and on June 22, 1988 she sentenced him to serve 12 months in prison and pay fines totalling $2,050.00. (Record 174).

Before his sentencing, the United States Probation Office prepared a presentence report which indicated *inter alia* that there were no factors present warranting departure under the Federal Sentencing Guidelines. The defendant filed objections to this report and presented character letters, psychological reports, and a memorandum of law in support of the request that a departure sentence be imposed. The psychological evidence in particular showed that

> "He appeared to be quite depressed. . . . His level of anxiety tends to impair his attention and concentration and may at times interfere with his perception. . . .

> "The history obtained from Mr. Crumling suggests that his bout with depression is not just situational in nature. It is my impression that he probably has been experiencing a major depression for several years, perhaps dating to the death of his father and the death of an aunt and uncle. It is also likely that he never really recovered from the breakup of a long term relationship that he had with a girlfriend. My impression is that this man has been overwhelmed with the events in his life over the period of the last four or five years and that he has probably been experiencing a major depression for most of that time. *It is likely that the depression sufficiently impaired his judgment that it contributed to his purchase of the pornographic materials.*"

(Record 162-163. Emphasis added).

Mr. Crumling appealed his conviction and sentence to the United States Court of Appeals for the Third Circuit. On appeal, represented by new counsel, Crumling argued that the District Court had misapprehended her departure authority and mistakenly supposed that she *could not* depart from the Sentencing Guidelines. Under the case law of the Third Circuit, *United States v. Cheape, Appeal of Kleinfelter*, 889 F.2d 477 (3rd Cir. 1989) the Circuit Court could review the failure to depart under such circumstances. Crumling presented the Circuit Court with several factors which he contended warranted departure and requested that the case be remanded to the District Court for resentencing. In particular, Crumling argued in his Brief (at page 28) that

> "the Sentencing Commission failed to take into account the significance of a 'sting' operation such as the one conducted in this case. Although the defense of entrapment was not raised at trial, it must be remembered that the only reason the Defendant was able to order and purchase the material in question is because the Government sought his order and then sold it to him. Several items of correspondence passed back and forth before the ultimate order was placed

> and the material carried to the Lewistown post office. The Defendant contends that such governmental persistence warrants a downward departure from the guidelines."

And again in his Petition for Rehearing (at page 10) he argued that departure was warranted by this factor and that moreover the decision not to remand was inconsistent with another recent Third Circuit decision.

> "It is with respect to [the sting] aspect of the prosecution that the defendant suggests that the panel decision was contrary to decisions of another panel on a similar issue: namely the decision of Chief Judge Higginbotham and Judges Sloviter and Alito in *United States v. Bierley, supra.* In *Bierley* this Court remanded for resentencing because the District Court failed to consider the defendant's role in the offense as a departure factor. In *Bierley*, the defendant was convicted of receiving child pornography through the mail from a Postal Inspection Service sting operation: just as in this case. This Court stated that the 'role in the offense' adjustment of guideline section 3B1.1, though not literally applicable, could be applied by analogy as a departure factor in the case of a one participant crime where the defendant received child pornography from a government sting. Because the facts of the present case are functionally identical to *Bierley* the defendant suggests that this case should be remanded for the imposition of a departure sentence." *

[Footnote 2 in the original] * "The Appellant recognizes that this issue was not raised in trial or post-trial proceedings in the lower court. The Appellant is now represented by new counsel and respectfully urges the Court of Appeals to consider this issue in order to avoid a manifest miscarriage of justice."

The Circuit Court affirmed both the sentence and the conviction. Mr. Crumling then filed a Petition for Rehearing which the Circuit Court denied on March 12, 1991. This Petition followed.

REASONS FOR GRANTING THE WRIT

Recently, this Court has granted certiorari review in the case of *Jacobson v. United States*, 893 F.2d 999, 916 F.2d 467 (8th Circuit 1990), certiorari granted, Supreme Court No. 90-1124 (April 22, 1991). In *Jacobson*, the Court will decide the following issue:

> "When government has attempted and failed in three separate undercover operations covering two years of testing and soliciting to persuade the defendant to receive child pornography through mails and defendant does not qualify either under Attorney General's guidelines for conduct of undercover operations or guidelines established for postal inspectors for inclusion in undercover operation in which defendant is finally ensnared, has defendant been entrapped as a matter of law?"

59 U.S. Law Week 3718 (April 23, 1991). The present case closely resembles *Jacobson*, and this Court should grant certiorari review here as well.

That which was said about Mr. Jacobson by the dissenters to the Eighth Circuit's affirmance of Jacobson's conviction (Chief Judge Lay and Senior Judge Heany) applies either directly or by close analogy to Mr. Crumling. (See, *U.S. v. Jacobson*, 916 F.2d 471-476). Both Jacobson and Crumling are middle aged men who were born to farming families and who currently reside with and take care of their parents. Both have decades of public service (Jacobson, in the military and as a school bus driver; and Crumling in the Mifflin County Public Assistance Office as a caseworker). Neither has a black mark on his record (aside from Jacobson's remote conviction for driving under the influence).

Both were targeted by postal inspection sting operations and were subjected to repeated mail solicitations over a lengthy time period. Both investigations evidently started because the Defendants (Jacobson and Crumling) were

found on mailing lists in California based mail order businesses. Both sting operations consisted of invitations and solicitations from fictitious organizations (in *Jacobson*, the American Hedonist Society; and in *Crumling*, Vintage Images, Ltd.); in both cases the mailings contained promises of confidentiality (in Jacobson, the American Hedonist Society called itself "private" and "for members only" (916 F.2d at 475)). Here as in *Jacobson* the Postal Inspection Service "posing as an imaginative variety of spurious organizations and individuals, all apparently legitimate, . . . first engaged [the Petitioner] in a dialogue about erotica, then presented him with a series of opportunities to purchase government-compiled pornography through the mails." (916 F.2d at 476). Here, as in *Jacobson*, "all the time, effort, expense, and ingenuity invested in apprehending [the Petitioner] yielded only a single conviction of a single individual for the receipt of [illegal materials] that would never have entered the United States mails had the Postal Service not deposited it there in the first place." (916 F.2d at 476).

Here, as in *Jacobson* "the Government invested considerable time and money to prosecute a man who never would have committed a crime but for the Government's encouragement". (916 F.2d at 471).

The principal distinction between this case and the *Jacobson* case is a procedural one: Jacobson asserted the defense of entrapment at trial, and Crumling did not. To the contrary, Crumling's defense at trial consisted of his testimony that he was conducting some sort of private investigation into the availability of child pornography so that he could eventually turn over his findings to an appropriate law enforcement agency for prosecution. (Record 51-56) This defense, of course, failed. However, the presentation of such desperate transparencies seems to reflect the depths to which generally honest and decent citizens are reduced in the face of Government

tactics such as the ones used in this case. Crumling had never been in trouble before in his life. He picks up a package from the post office, goes about his daily affairs, and the next thing he knows, he is being confronted by postal inspectors at his place of employment. It is clear that the District Court did not penalize Mr. Crumling for the nature of his defense; indeed she recognized his emotional state and credited him two levels under the Sentencing Guidelines for acceptance of responsibility. (Record 173).

Therefore, Crumling did not appeal to the Circuit Court requesting that his conviction be overturned on the basis that he was entrapped as a matter of law or that his conviction resulted from outrageous Government conduct. However, he did contend that the twelve month sentence which he received from the District Court in accordance with her perceived required compliance with the Sentencing Guidelines was over-severe and that he should have his case remanded for the imposition of a departure sentence. That is the point which the Petitioner now urges upon this Court.

18 U.S.C. § 3553(B) and Sentencing Guidelines § 5K2.0 provide that the sentencing court may impose a sentence outside the range established by the applicable guideline if the Court finds "that there exists [a] . . . mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Although some examples of this variety of departure criteria appear in the guidelines, the Commission admits that such circumstances "cannot, by their very nature, be comprehensibly listed and analyzed in advance." Guideline Section 5K2.0. There is no indication anywhere in the Sentencing Guidelines that the commission gave any consideration to Government inducement, Government action, or the effect of a sting operation in mitigating the sen-

tence, and indeed the culpability, of decent citizens in the position of Mr. Crumling or Mr. Jacobson.

The Sentencing Commission identifies its statutory mission as follows:

> "The Sentencing Reform Act of 1984 (Title 2 of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of *criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.*"

Chapter 1—Introduction and General Application Principles, Part A—Introduction, Paragraph 2. "The Statutory Mission". (emphasis added.)

All of these factors are affected by Government participation in the manufacture of a crime and governmental invitation to commit crime.

The need for specific deterrence against the "offender" is effectively removed by the knowledge that the defendant would never have committed the crime but for governmental action; and thus the most effective kind of deterrence would simply be for the Government to abstain from "the deliberate manufacture of a crime that would never have occurred but for the Postal Service's overzealous efforts to create it" in Judge Heany's words. (916 F.2d 476).

The need for "just punishment" is similarly reduced by the knowledge that a defendant, like Mr. Crumling, committed his offense only after months of governmental invitations and solicitation.

The need for "incapacitation" in a case such as this one does not exist. Indeed, although the Guidelines warn courts not to consider family responsibilities and the like in making sentencing decisions, Mr. Crumling's "incapacitation" by incarceration works a grievous harm to himself and his elderly mother who relies on him for day-to-day assistance.

Finally, with respect to rehabilitation, it is absurd to suppose that 12 months in jail for Ed Crumling will work any benefits in this regard. Incarcerating this middle-aged depressed man who has recently lost his father and who devotes his life to tending to his mother for buying obscene materials from the Postal Service may "rehabilitate" him from trust, self-confidence, and the ability to live without constant fear of the impending attack of powerful enemies. Assuming this is not the sort of rehabilitation of which the Guidelines speak, then departure would be warranted.

Furthermore, implicit in the entire Guidelines system and indeed in the entire theory of sentencing is the thought that a sentence should appropriately penalize an offender for his personal responsibility in an offense. Where an innocent citizen is targeted, solicited, induced, and pursued by Government sting operators, the element of criminal responsibility is reduced as is the propriety of harsh sentencing.

In the present case, the District Court concluded that she had no authority to depart from the Sentencing Guidelines. This conclusion, erroneous though it was, was made manifest by that Court's remarks at sentencing. The probation officer in the pre-sentence report indicated that there were no factors which warranted a departure from the guideline sentence. (Record 125). The Defendant, through his counsel, took specific objection to that determination and submitted a letter which suggested factors warranting departure (Record 134-136). The Government responded that "the District Court *lacks the authority* to depart from the guideline range" (Record 138. Emphasis supplied). At sentencing, the District Court specifically referred to the Defendant's request for a departure sentence (the Court used the word "reduction"). However, the Court indicated that she would "accept the Government's response" to that suggestion:

i.e., that the Court "lack[ed] authority" to depart from the guidelines. (Record 173).

The Circuit Court had the authority to review the District Judge's misapprehension of her departure authority. *United States v. Cheape, Appeal of Kleinfelter*, 889 F.2d 477 (3rd Cir. 1989). The Circuit Court refused, however, to remand for resentencing. Since the date of the Circuit Court's denial of the Petition for Rehearing this Court has granted certiorari review in *Jacobson v. The United States.* The same issues which *Jacobson* presents are in this case, although here they appear as sentencing issues rather than guilt issues. This Court should grant certiorari review here so that the Guidelines can be understood to provide District Courts with downward departure authority in cases where the actual crime is manufactured by Government persistence and where the defendant is drawn into criminal conduct which would otherwise have been non-existent, and indeed (in light of the fact that the Government provided the opportunity, means, and criminal materials in this case) actually impossible.

CONCLUSION

WHEREFORE, the Petitioner Edwin Crumling respectfully requests that this Honorable Court grant his petition for a writ of certiorari to the U.S. Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5585

UNITED STATES OF AMERICA,
Appellee,

v.

EDWIN L. CRUMLING,
Appellant.

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Criminal Action No. 87-00147)

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRCIA, COWEN, NYGAARD and ALITO, *Circuit Judges*, and ATKINS, *District Judge* *

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and

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* Hon. C. Clyde Atkins, Senior District Judge of the United States District Court for the Southern District of Florida, sitting by designation. Judge Atkins was limited to voting for panel rehearing.

to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ William D. Hutchinson
Circuit Judge

DATED. Mar. 12, 1991

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5585

UNITED STATES OF AMERICA,
Appellee,
v.
EDWIN L. CRUMLING,
Appellant.

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Criminal Action No. 87-00147)

District Judge: Honorable Sylvia H. Rambo

Argued: January 25, 1991

PRESENT: BECKER and HUTCHINSON, *Circuit Judges*, and ATKINS, *District Judge* *

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to wit:

1. Whether, in this prosecution for violation 18 U.S.C. § 2252(a)(2, the prosecution failed to prove, beyond a reasonable doubt, the essential element of

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*Hon. C. Clyde Atkins, Senior District Judge of the United States District Court for the Southern District of Florida, sitting by designation.

its case that the items in question were "mailed" within the meaning of the statute;

2. Whether the government failed to establish, beyond a reasonable doubt, the essential element of the offense that the materials in question contained visual depiction of explicit sexual conduct by "minors" as that term is defined in 18 U.S.C. § 2255a);

3. Whether the government failed to establish, beyond a reasonable doubt, the essential element of the offense that the defendant received the prohibited materials "knowingly and willfully";

4. Whether the district court should have granted the defendant's Motion for Judgment of Acquittal because of the discrepancy between the allegations and proof with respect to the date of the alleged offense;

5. Whether the district court should have departed from the guidelines to impose a probationary sentence; and

6. Whether the trial court's judgment of sentence of one year's incarceration in compliance with a correct application of the federal sentencing guidelines; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

/s/ William D. Hutchinson
Circuit Judoge

ATTEST:

/s/ Sally Mrvos
SALLY MRVOS
Clerk

Dated: Feb. 5, 1991

APPENDIX C

UNITED STATES DISTRICT COURT
MDIDLE DISTRICT OF PENNSYLVANIA

Case Number 3: CR-89-147

UNITED STATES OF AMERICA

v.

EDWIN L. CRUMLING

JUDGMENT INCLUDING SENTENCE UNDER
THE SENTENCING REFORM ACT

[Filed Jun. 22, 1990]

Paul J. Killion, Esquire, Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____.

☒ was found guilty on count 1 after a plead of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section

18 U.S.C. § 2252(a)(2)

Nature of Offense

Receipt by mail of material visually depicting minors engaging in sexually explicit conduct, a class D felony.

Count Number(s) 1

The defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) ————, and is discharged as to such count(s).

☐ Count(s) ———— (is) (are) dismissed on the motion of the United States.

☒ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

☐ It is ordered that the defendant shall pay to the United States a special assessment of $————, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for his district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:

193-36-0461

Defendant's mailing address:

R.D. #1, Box C-271
Reedsville, PA 17084

Defendant's Soc. Sec. Number:

Same

June 22, 1990
Date of Imposition of Sentence

/s/ Sylvia H. Rambo
Signature of Judicial Officer
SYLVIA H. RAMBO
U.S. District Judge
Name & Title of Judicial Officer

June 22, 1990
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of twelve (12) months.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district,

☐ at ——— a.m. / p.m. on ———.

☐ as notified by the Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☒ before 2 p.m. on July 30, 1990.

☐ as notified by the United States Marshal.

☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on ——— to ——— at ———, with a certified copy of this Judgment.

_____

United States Marshal

By _____

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of ——— two (2) years.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supercised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

1. The defendant shall pay the time in installments as directed by the probation office during the term of supervised release.

2. The defendant shall successfully complete mental health treatment as deemed necessary by the probation office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall

submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $2,050.00, consisting of a fine of $2,000.00 and a special assessment of $50.00.

☐ These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

This sum shall be paid

☒ as follows: immediately

The fine shall be paid in installments as directed by the probation office during the term of supervised release. The special assessment shall be paid immediately through the Clerk of Court, P.O. Box 8983 Harrisburg, PA 17108.

☐ The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

SENTENCE—STATEMENT OF REASONS

Sentence:

Custody: Twelve (12) months
Supervised Release: Two (2) years
Special Condition: Pay fine in installments
Special Assessment: $50
Fine: $2,000

Reasons:

1) Due to defendant's emotional health, it is the opinion of the court that defendant can not come to grips with acceptance of responsibility. Therefore, he will be given the benefit of the doubt and be given a 2 point reduction for acceptance of responsibility thereby making his base offense level 13 with a sentencing range of 12 to 18 months. A sentence at the lower end of the range is deemed adequate in meeting the sentencing goals of providing a penalty and deterrence.

2) Mr. Crumling's financial profile indicates that he has some ability to pay a fine, but only below the guideline range. A fine will provide an additional penalty.

3) The special assessments are required by law.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Criminal No. 1: CR-89-147

UNITED STATES OF AMERICA,
Plaintiff,

v.

EDWIN L. CRUMLING
Defendant.

MEMORANDUM

[Filed Dec. 13, 1989]

On November 7, 1989 a bench trial was held upon an indictment charging defendant with receiving through the mails visual depictions of minors engaged in sexually explicit conduct in violation of 18 U.S.C. 2252(a)(2). At the conclusion of the testimony the defendant moved for judgment of acquittal arguing that the controlled delivery as per the facts of this case did not satisfy the government's burden of establishing the essential element that the visual depictions were received through the mails. The court directed the defendant file a memorandum in support of this argument. The defendant has filed the memorandum; however, he has also raised other issues in the memorandum that were not initially submitted to the court. The issues before this court are as follows: (1) whether the proscribed materials were received through the mail; (2) whether the government proved that the defendant acted knowingly; (3) whether the alleged date of the offense as set forth in the indictment

is materially different from the proof at trial; and (4) whether defendant possessed the proscribed materials with the requisite intent. For the reasons set forth below, defendant's motion for judgment of acquittal will be denied.

1. *Mailing*

As a result of an undercover operation conducted by the United States Postal Inspection Service, the agents working in the operation received an order from defendant for the purchase of certain proscribed material. In response to that order, Inspector Harris prepared the materials in question for mailing by controlled delivery to Crumling. The magazines were properly addressed, sealed, and the appropriate postage affixed to it for mailing from Los Angeles, California to Lewistown, Pennsylvania. In actuality, however, Inspector Harris personally delivered the package to the post office in Lewistown Pennsylvania. The package was hand delivered to a postal employee in Lewistown who in turn placed a notice of package delivery in Crumling's post office box. The package itself was shelved by a postal employee. Crumling ultimately received the notice of package delivery and presented the notice of delivery to the postal employee who in turn physically handed to Crumling the package containing the proscribed material.

This court agrees with defendant that "there is a paucity of cases discussing the instant issue." Defendant's Brief at 2. Furthermore, the court does not believe that the cases cited by the government are on point. Defendant does cite to the case of *Satterfield v. Celebreeze*, 244 F. Supp. 190 (W.D.S.C. 1965), wherein the court held "the word 'mailing' used in section G does not refer to the time when plaintiff received or perhaps should have received the notice, the word means that the letter was placed in an appropriate mail receptacle, maintained by the post office department, properly addressed with postage prepaid." *Id.* at 192. Contrary to defendant's con-

tention, the conditions of mailing as described in the *Satterfield* case have been met in this case. The mailing was hand delivered to a postal employee at the Lewistown post office who accepted and retained the package, and placed a notice of delivery in defendant's post office box. Defendant retrieved the notice from his post office box and presented it to the postal employee who then delivered the package to defendant. The package was properly addressed and contained postage on the envelope. Thus it is the opinion of the court that the materials defendant received were received through the mail.

2. *Knowingly*

Crumling argues that the prosecution failed to adduce sufficient proof that he acted with the requisite knowledge. Some courts which have ruled that scienter is an element of 18 U.S.C. 2252(a)(2) have held that evidence that the receivers of child pornography knew that the materials contained child pornography when they accepted them was sufficient to establish this element of the offense. *United States v. Marchant*, 803 F.2d 174 (5th Cir. 1986); *United States v. Hale*, 784 F.2d 1465 (9th Cir.), *cert. denied*, 479 U.S. 829 (1986). Furthermore, defendant testified that he ordered the child pornography material albeit, according to him, to assist law enforcement. Thus he has acknowledged through his own testimony that he knew what the materials contained.

3. *Variance*

The indictment states that the offense occurred on June 18, 1988 but the evidence reflects that the violation occurred on or about November 18, 1988. Defendant argues that this is a material variation which dictates dismissal of the indictment.

In *United States v. Castro*, 776 F.2d 1118 (3d Cir. 1985), *cert. denied*, 475 U.S. 1029 (1986), the court stated:

We noted in *United States v. Somers*, 496 F.2d 723, 743 (3d Cir.), *cert. denied*, 419 U.S. 832, 95 S. Ct. 56, 42 L.Ed.2d 58 (1974) that two types of variations between the indictment and evidence exist: *amendments*, which occur when the charging terms of the indictment are altered, and *variances*, where the charging terms are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment. *Somers*, 496 F.2d at 743 n.38 *quoting Gaither v. United States*, 413 F.2d 1061, 1071 (D.C. Cir. 1969). The difference between these variations is not merely academic, for we observed that Supreme Court precedent indicated that if the variation were characterized as an amendment, it would constitute a *per se* violation of the fifth amendment's grand jury clause. *Somers*, 496 F.2d at 743. Variances, however, are subject to less stricter case-by-case inquiry, and would only constitute reversible error in those cases where the variance prejudiced the defendant's defense. *Id.* at 743-44. Our analysis led us to conclude that:

> in evaluating variances, we must first determine whether there has been a modification in the elements of the crime charged. . . . If such a modification exists, we will apply the *per se* rule of *Stirone* [*Stirone v. United States*, 361 U.S. 212, 80 S. Ct. 270, 4 L.Ed.2d 252 (1960)] so as to preserve the shielding function of the grand jury. If, on the other hand, the variance does not alter the elements of the offense charged, we will focus upon whether or not there has been prejudice to the defendant. . . .

Somers, 496 F.2d at 744 (citations omitted).

Castro, 776 F.2d at 1121-22 (footnotes omitted).

This court has directed the United States Attorney to deliver to it the notes of testimony of the grand jury.

A review of the grand jury material makes it clear that this offense did indeed occur on November 18, 1988 and there is nothing to support a June 18, 1988 date. In any event, there is nothing in the record to show defendant was prejudiced by this variation. As the government states, defendant was in possession of all of the evidence that was admitted at trial in advance of trial, and had adequate notice that the offense occurred on November 18, 1988.

4. *Possession With the Requisite Intent*

Defendant argues that his possession of the forbidden materials within the unopened package from Los Angeles, California falls short of the knowing and intentional dominion required for that possession to be illegal. Defendant argues that mere acquisition of a package without knowledge of its contents is not a knowing and intentional possession. On or about August 1988 the defendant made certain mailings, including an order for three magazines, to a London-addressed company called Vintage Image Limited. Government Exhibit 7 is a letter from Vintage Image acknowledging receipt of defendant's order for the three pieces of material. The letter states, "In an effort to reduce shipping costs, your material will be posted within the United States." The package mailing the prescribed material has a return address of Vintage Photo Services of Hollywood, Los Angeles, California." Thus defendant knew he would receive the materials he requested from a United States address and, further, because the return address on the package contained the name of "Vintage," defendant was more than adequately placed on notice that the materials contained in the package were the proscribed materials. He knew what they were and he has admitted ordering the material. Thus, this argument is without substance.

The defendant's motion for judgment of acquittal will be denied. An appropriate order will be issued.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: December 13, 1989

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Criminal No. 1: CR-89-147

UNITED STATES OF AMERICA,
Plaintiff,

v.

EDWIN L. CRUMLING,
Defendant.

JUDGMENT ORDER

[Filed Dec. 13, 1989]

In accordance with the accompanying memorandum, IT IS HEREBY ORDERED THAT:

1) defendant's motion for judgment of acquittal is denied;

2) defendant is found guilty as charged;

3) sentencing is deferred pending receipt by the court of the presentence report; and

4) defendant is continued on bail as previously set by the magistrate.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: December 13, 1989.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Criminal No. 3: CR-89-147

UNITED STATES OF AMERICA,
Plaintiff,

v.

EDWIN L. CRUMLING,
Defendant.

MEMORANDUM AND ORDER

[Filed Mar. 19, 1990]

Before the court is defendant's motion for a new trial. The motion is briefed and ripe for consideration.[1]

On November 7, 1989 a bench trial was held upon an indictment charging defendant with receiving through the mails visual depictions of minors engaged in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(2). At the conclusion of the testimony, the defendant moved for judgment of acquittal arguing that the controlled delivery under the facts of the case did not satisfy the government's burden of establishing the essential element that the visual depictions were received through

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[1] The Government states that by virtue of defendant's argument the motion is more appropriately viewed as one for a judgment notwithstanding the verdict. Memorandum in Opposition at 1-2. The court agrees that defendant could have characterized his complaint differently, and in doing so requested different relief. The court notes the alternative would have been a Motion for a Judgment of Acquittal under Federal Rule of Criminal Procedure 29.

the mails. The court directed parties to file memoranda on this argument. Defendant's memorandum addressed the mailing issue, as well as several other arguments supporting his motion.

The court considered defendant's motion and, in an order dated December 13, 1989, denied it. In addressing defendant's argument that there was no "mailing," the court stated: "the mailing was hand delivered to a postal employee at Lewistown post office, who accepted and retained the package and placed a notice of delivery in defendant's post office box." Order at 2. The court held that the government had sufficiently met its burden on the element of a mailing given the above circumstance and others which are not relevant to the instant motion.

On January 8, 1990, defendant filed the motion under consideration. In this motion defendant renews his argument that no mailing occurred because, contrary to the court's memorandum, it was not postal *employees* who handled and placed the mailing in question in an appropriate mail receptacle, but postal *inspectors*. Defendant contends this distinction negates the court's earlier finding that the element of a mailing was met. Indeed, the copy of relevant transcript sections which defendant supplied shows that it was postal inspectors who handled the package. Defendant's Brief in Support of Motion for New Trial at 2-3.

The government argues in opposition that postal inspectors, as employees of the Postal Service, are empowered to fulfill the mission of the service which is " 'to provide for the collection, handling, transportation, delivery, forwarding, returning and holding of mail.' " Memorandum in Opposition to Defendant's Motion for a New Trial at 4 (quoting 39 U.S.C. § 404(a)(1)). This position is supported by the definitional section of the Code of Ethical Conduct for Postal Employees in the Federal Regulations. See 39 CFR §§ 447.11 to -.91 (1988). A postal employee is defined thusly:

> An individual appointed to a position, temporary or permanent, within the Postal Service, or hired as an executive under an employee contract, including a substitute. The term "employee" does not include the Governors of the Postal Service and members of the Postal Service Advisory Council nor, unless the context requires, a special Postal Service employee."

39 CFR § 447.81(b).

A Special Postal Service employee is defined as:

> An individual retained, designated, appointed, or employed in the Postal Service to perform, with or without compensation, temporary duties either on a full-time or intermittent basis for not to exceed 130 days during a period of 365 consecutive days.

Id. § 447.81(e).

For these reasons and those stated in the court's earlier memorandum on this issue, the court finds that the element of a "mailing" was satisfied and therefore, denies defendant's motion.

IT IS HEREBY ORDERED THAT:

1) defendant's motion for a new trial is denied;

2) upon consideration of the request of defense counsel, contained in his letter to the court dated February 1, 1990, for an extension of time to file objections to the presentence report, the request is granted. Objections to the report shall be filed no later than March 30, 1990.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: March 19, 1990.

APPENDIX G

18 USC section 2252. Certain activities relating to material involving the sexual exploitation of minors.

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce by any means including by computer or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(3) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly sells or possesses with intent to sell any visual depiction; or

(B) knowingly sells or possesses with intent to sell any visual depiction that has been mailed, or has

been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means, including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; or

(4) either—

(A) in the special maritime and territorial jurisdiction or the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly possesses 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction; or

(B) knowingly possesses 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transportated in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b) (1) Whoever violates paragraph (1), (2), or (3) of subsection (a) shall be fined under this title or imprisoned not more than ten years, or both, but if such

person has a prior conviction under this section, such person shall be fined under this title and imprisoned for not less than five years nor more than fifteen years.

(2) Whoever violates paragraph (4) of subsection (a) shall be fined under this title or imprisoned for nor more than five years, or both.

18 U.S.C. section 3553. Imposition of a sentence.

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purpose set forth in paragraph (2) of this subsection. This court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and chararacteristics of the defendants;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to the criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

(3) the kinds of sentence available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(c) Statement of reasons for imposing a sentence.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months,

the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reasons for the imposition of a sentence different from that described.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.—Upon motion of the Government,

the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

APPENDIX H

FEDERAL SENTENCING GUIDELINES SECTION 5k2.0

Grounds for Departure (Policy Statement)

Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstances of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the courts. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in the guidelines (*e.g.*, as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Where, for example, the applicable offense and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guideline range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, disruption of a governmental func-

tion, § 5K2.7, would have to be quite serious to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the theft offense guideline is applicable, however, and the theft caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.

Supreme Court, U.S.
FILED
AUG 5 1991
OFFICE OF THE CLERK

(2)

No. 90-1854

In the Supreme Court of the United States

OCTOBER TERM, 1991

EDWIN L. CRUMLING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

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QUESTION PRESENTED

Whether the district court erred in not departing downward from the Sentencing Guidelines range, on the ground that petitioner was the victim of a government "sting" operation.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1854

EDWIN L. CRUMLING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 3a-4a) is unreported, but the judgment is noted at 928 F.2d 397 (Table).

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1991. A petition for rehearing was denied on March 12, 1991. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on June 3, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of receiving through the mails sexually explicit material depicting a minor, in violation of 18 U.S.C. 2252(a)(2). He was sentenced to 12 months' imprisonment, to be followed by two years' supervised release. He was also ordered to pay a fine of $2,000. The court of appeals affirmed by judgment order. Pet. App. 3a-4a.

1. In July 1987, petitioner came to the attention of the United States Postal Inspection Service when a warrant-authorized search of a pornographic video outlet in Florida yielded a letter that petitioner had written in October 1986, asking for videotapes that depicted young teenagers engaged in sexual activities. C.A. App. 14-15, 52, 58-59. As a result of that discovery, in August 1987 a postal inspector, purporting to represent a fictitious organization advocating sexual freedom, sent petitioner a questionnaire inquiring about his sexual interests. Three days later, petitioner returned the completed questionnaire, indicating on it a preference for heterosexual teenage sex. C.A. App. 15-16.

Because of petitioner's responses to the questionnaire, the inspector sent him a letter from a fictitious company that claimed to sell child pornography. The bottom of the letter was a coupon that the reader could return for further information. Ten days later, petitioner returned the coupon with a handwritten note in which he expressed his interest in erotic heterosexual material involving teens or pre-teens, as well as material involving girls or women engaged in bestiality. He also wrote that he would like to meet teen or pre-teen girls, if the company had such contacts. Noting that he sought "discretion," petitioner requested that any information be sent to his post office box. C.A. App. 16-18, 58; Pet. 3.

In response to that communication, the inspector sent petitioner a list of child pornography magazines. Ten days later, petitioner ordered three magazines for $55. C.A. App. 18-19; Gov't C.A. Br. 5-6.[1] In response to the order, the inspector sent petitioner a confirmation letter. C.A. App. 19-20. In November 1988, after a controlled delivery of two of the magazines, the inspector interviewed petitioner, who claimed that he opposed child pornography and that he had ordered the magazines in an attempt to gather information on distributors of such material. Although petitioner said that he had planned to turn over any information he obtained to the police, he admitted that he had never contacted them about the matter. C.A. App. 20-22, 25.

2. In his own defense, petitioner reiterated what he had told the postal inspectors, *i.e.*, that he had ordered the magazines because he "had gotten ads for child pornography and was trying to follow up on it and was doing an informal investigation." C.A. App. 49, 55-56, 59. He denied that he had any interest in meeting young girls, claiming that he had simply wanted to "find[] out about contacts who would be involved in perhaps child prostitution," "selling children," and "renting children." C.A. App. 58. He again acknowledged that he had never informed law enforcement authorities about his "investigation." C.A. App. 59-60. He claimed that the motive for the "investigation" was his "concern about the welfare of children" and his belief that "[c]hildren or innocent children are vulnerable." C.A. App. 59.

3. Under Sentencing Guidelines § 2G2.2, petitioner's base offense level was 13. The presentence report assigned him a two-point increase under Guidelines § 2G2.2(b)(1), because the magazines that he had ordered depicted prepubescent minors or mi-

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[1] The magazines are described at C.A. App. 18-19 and Gov't C.A. Br. 5-6.

nors under 12 years old. C.A. App. 120. With an adjusted offense level of 15 and a criminal history category of I, petitioner's sentencing range was 18 to 24 months. C.A. App. 121. The presentence report identified no factors warranting a departure. C.A. App. 125.

Petitioner filed objections to the presentence report. C.A. App. 131-136. In a presentence memorandum, C.A. App. 105-110, and again at sentencing, C.A. App. 170-172, he asked the district court to depart downward. See also C.A. App. 172-173 (petitioner's allocution). The court rejected the request, C.A. App. 173, agreeing with the government that none of the factors cited by petitioner warranted a downward departure, C.A. App. 137-138. The court did, however, grant petitioner's request for a two-point reduction in his offense level for acceptance of responsibility.[2] With the two-point increase for material involving young children, petitioner's adjusted base offense level was 13. From a sentencing range of 12 to 18 months' imprisonment, the court imposed the minimum term.

4. On appeal, petitioner urged a ground for departure that he had not previously raised. While acknowledging that he had not asserted the defense of entrapment at trial, petitioner alleged in conclusory fashion that he would not have committed the crime

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[2] At sentencing, defense counsel stated that petitioner "is here to acknowledge" that his reason for ordering the magazines "was not solely [to] conduct[] some type of an investigation." C.A. App. 171-172. Petitioner, however, made no such acknowledgment. The court awarded petitioner the reduction even though it found that petitioner "cannot come to grips with acceptance of responsibility," C.A. App. 173, and even though the probation office had recommended against the reduction on the ground that petitioner "does not believe he is guilty." C.A. App. 120. The government appealed this ruling, and the court of appeals affirmed by judgment order. 931 F.2d 52 (1991) (Table).

but for "governmental persistence" in soliciting him. Pet. C.A. Br. 28. In his view, a departure was warranted because the "sting" operation was a mitigating factor that the Sentencing Commission had failed to take into account in establishing the Sentencing Guidelines. *Ibid.* The court of appeals affirmed by judgment order, rejecting without discussion all of petitioner's claims, including the one presented in the petition. Pet. App. 3a-4a.

ARGUMENT

Petitioner argues that the court of appeals erred in declining to remand his case to the district court for consideration of the government's sting operation as a basis for downward departure. That claim does not merit review by this Court.

1. Petitioner did not properly preserve his claim, because he did not raise it in the district court. His objections to the presentence report, his sentencing memorandum, and the sentencing hearing itself are devoid of any suggestion that the government's conduct somehow lessened his responsibility for the crime. In fact, petitioner conceded in his petition for rehearing in the Third Circuit, quoted at Pet. 7, and he concedes again in this Court, Pet. 7, that he never raised his entrapment claim in the district court at sentencing. Petitioner's failure to raise that claim in the district court is not surprising, because his defense at trial—which he asserted through his own testimony and which he now dismisses as a "desperate transparenc[y]," Pet. 9—was that he had knowingly ordered the child pornography as part of his own private investigation of distributors of such material. Not until his case was on appeal did petitioner allege that the government's own conduct should serve as a basis for a downward departure. See Pet. C.A. Br. 28.

The courts of appeals have uniformly held that a district court's discretionary refusal to depart down-

ward from the applicable Sentencing Guidelines range is not subject to review on appeal. *United States* v. *Tucker*, 892 F.2d 8, 9-11 (1st Cir. 1989); *United States* v. *Colon*, 884 F.2d 1550, 1552 (2d Cir.), cert. denied, 110 S. Ct. 553 (1989); *United States* v. *Denardi*, 892 F.2d 269, 272 (3d Cir. 1989); *United States* v. *Bayerle*, 898 F.2d 28, 30-31 (4th Cir.), cert. denied, 111 S. Ct. 65 (1990); *United States* v. *Draper*, 888 F.2d 1100, 1105 (6th Cir. 1989); *United States* v. *Franz*, 886 F.2d 973, 976 (7th Cir. 1989); *United States* v. *Ybabez*, 919 F.2d 508, 510 (8th Cir. 1990); *United States* v. *Morales*, 898 F.2d 99, 102-103 (9th Cir. 1990); *United States* v. *Maldonado-Campos*, 920 F.2d 714, 718 (10th Cir. 1990); *United States* v. *Fossett*, 881 F.2d 976, 979-980 (11th Cir. 1989); *United States* v. *Ortez*, 902 F.2d 61, 63-64 (D.C. Cir. 1990). See also *United States* v. *Rojas*, 868 F.2d 1409, 1410 (5th Cir. 1989); *United States* v. *Buenrostro*, 868 F.2d 135, 139 (5th Cir. 1989), cert. denied, 110 S. Ct. 1957 (1990). Accordingly, petitioner's claim that the court should have departed sua sponte based on the government's involvement in his offense is not an issue that is subject to appellate review.

Moreover, petitioner's failure to raise his present claim in the district court is fatal to his claim. In light of petitioner's failure to ask the district court to depart downward on the basis of the government's conduct, the district court's judgment could not be set aside unless the district court was required to depart downward on such a basis. No such claim could be made, however, since no statute or Sentencing Guideline requires the district court to depart downward on this (or any other) basis.

Contrary to petitioner's contention, Pet. 12-13, the district court did not suggest that it would have departed downward from the Guidelines range on the basis of the government's "sting" operation but for the court's belief that it lacked the authority to do so. At sentencing, the court said "I accept the Government's response to [petitioner's] arguments [in favor

of a downward departure]," C.A. App. 173, and the government had concluded in its sentencing memorandum that "the District Court lacks the authority to depart from the guideline range," C.A. App. 138. Petitioner relies on those statements as the basis for his argument that the district court believed that it could not depart downward, but petitioner has misread the two statements. The government's conclusion was offered in response to other arguments made by petitioner, see C.A. App. 105-110, and the district court's statement must be read in light of the specific arguments that petitioner offered. Because petitioner did not argue to the district court that he should receive a downward departure on the ground that he committed the offense as the result of a "sting" operation, the court's comment at sentencing cannot be treated as a legal ruling that a defendant cannot receive a downward departure if he is apprehended as the result of a "sting" operation.

2. Petitioner's reliance, Pet. 7, on *United States* v. *Bierley*, 922 F.2d 1061 (3d Cir. 1990), is misplaced. There, the defendant, who had been convicted of receiving child pornography through the mail during an undercover operation, asked the district court to reduce his base offense level pursuant to Guidelines § 3B1.2 on the theory that, compared to the undercover agent, he played only a minor or minimal role in the offense. The district court held that the adjustment was unavailable as a matter of law because the defendant was the sole "participant" in the offense. The district court also explicitly said that it would have departed downward but for its belief that it lacked the authority to do so. The court of appeals remanded the case for resentencing, reasoning that, while the adjustment under Sentencing Guidelines § 3B1.2 was unavailable, the district court could properly have departed had it determined, by analogy to that section, that the defendant's conduct would have qualified as minor or minimal if the under-

cover postal inspector had qualified as a "participant."

In *Bierley*, unlike in this case, the defendant presented to the district court the asserted basis for a downward departure, and the district court specifically ruled that it would have departed downward if it had possessed the authority to do so. In such a case, the defendant has preserved his claim for review in the court of appeals. By contrast, in this case petitioner did not give the district court the opportunity to consider the nature of the government's conduct as a basis for a downward departure. The Third Circuit's decision in *Bierley* therefore does not assist petitioner.[3]

3. Finally, there is no need to hold the petition in this case pending the Court's decision in *Jacobson* v. *United States*, cert. granted, No. 90-1124 (Apr. 22, 1991). The question presented in *Jacobson* is whether Jacobson was entrapped as a matter of law by the government's efforts to investigate trafficking in child pornography. Given the material differences between the questions presented in the two cases, this Court's decision in the *Jacobson* case will not have any effect on the proper disposition of this one.

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[3] In any event, any allegation of an intra-circuit conflict is for the court of appeals, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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